No. 80-581

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power & Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power & Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc. and Western Energy Company,

Appellants,

against

State of Montana, Thomas L. Judge, Governor of Montana, Mary Craig, Director of the State Department of Revenue, and David M. Lewis, Director of Administration and State Treasurer,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF THE STATES OF MINNESOTA, IOWA, MICHIGAN AND WISCONSIN IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTEREST OF AMICI CURIAE

Amici Curiae, the States of Minnesota, Iowa, Michigan and Wisconsin, have historically looked to the State of Montana for the coal to satisfy a significant portion of their energy needs. A sizeable share of the coal produced in Montana is purchased by energy consumers in other states who in return provide to the State of Montana a significant share of the revenue which it collects in the form of coal severance taxes. Because it is estimated that Amici's consumption of Montana coal will increase substantially by the middle of this decade, their obligation for payment of coal severance taxes to Montana will increase geometrically if the 30 percent Montana Coal Severance Tax, Mont. Rev. Codes Ann., § 84-1312 *et seq.*, is allowed to stand.

In accordance with Appellants' position, the Amici maintain that the imposition of a 30 percent tax on coal mined in Montana at a time when federal energy policy is directed toward increased reliance on coal as a substitute for imported oil and domestic reserves is contrary to the Supremacy Clause of the United States Constitution. The two Montana courts which have had the opportunity to address this issue have determined that, as a matter of law, the Coal Severance Tax does not violate the Supremacy Clause. In so doing, both courts have refused to discern the impact of the tax on federal energy policy. If this Court were to allow the decision of the Montana courts to stand, it would thereby demonstrate that a state may undermine the clear mandate of the federal government with impunity.

Because the validity of the Montana Coal Severance Tax has a direct and substantial effect upon the Citizens of other states, the Amici present their views to the Court. It is hoped

that the Court will find the views expressed herein helpful in deciding to note probable jurisdiction.

SUMMARY OF ARGUMENT

A state law which impedes or frustrates federal policy or objectives is invalid under the Supremacy Clause of the United States Constitution. In recent years, the federal government, through its laws, regulations and express declarations, has fashioned an energy policy which favors the use and production of coal, particularly the low sulfur coal found in the western states, as a substitute for oil and natural gas. By increasing the severance tax on its coal to an unprecedented level, the State of Montana has increased the cost of coal to its sister states to such a degree that it has undermined important federal policies which favor an increase in the consumption of coal relative to petroleum products.

ARGUMENT

I. A STATE LAW WHICH FRUSTRATES OR IMPAIRS FEDERAL POLICY IS INVALID UNDER THE SUPREMACY CLAUSE.

This Court recently reaffirmed the parameters of the preemptive effect of the Supremacy Clause in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), when it stated that state action which conflicts with federal law or would frustrate the federal scheme must be invalidated. Id. at 321. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) it was recalled that:

> A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); *Jones v. Rath Packing Co.*, supra, 430 U.S. at 526, 540-541, 97 S.Ct. at 1310, 1316-1317. *Accord, De Canas v. Bica*, 424 U.S. 351, 363, 96 S.Ct. 933, 940, 47 L.Ed.2d 43 (1976).

Id. at 158.

The clear thrust of the Supremacy Clause doctrine has thus been to invalidate state laws which frustrate or undermine federal policy.

II. NATIONAL ENERGY POLICY FAVORS THE PRODUCTION AND USE OF COAL IN LIEU OF PETROLEUM FUELS.

The record herein contains extensive documentation of the national energy policy as presented to the Montana court. In the interest of brevity, a description of the contours of that policy is not repeated here. Suffice it to say that the Amici disagree with the Montana court's finding that no national energy policy is discernible as a matter of law (Appendix to Jurisdictional Statement at 34-35a) and maintain that the myriad of federal enactments and statements to which Appellants have directed the Court's attention demonstrate a cohesive federal energy policy which favors the use of coal as a substitute for petroleum products.

III. THE MONTANA COAL SEVERANCE TAX IS INVALID BECAUSE IT FRUSTRATES THE EXPRESS GOALS OF THE FEDERAL GOVERNMENT.

A series of recent congressional enactments and presidential directives has encouraged the use of coal as a substitute for petroleum products. In affirming the trial court's dismissal of the complaint, the Montana Supreme Court denied plaintiffs the opportunity to present evidence on the question of the effect of the Coal Severance Tax on federal energy policy. Logic dictates that the increased tax serves to frustrate that policy.

Forcing energy consumers to pay a significantly higher rate for coal clearly makes coal a less attractive energy source. By doing so at a time when the thrust of federal activity encourages increased reliance on coal, the state of Montana frustrates this country's goal of lessening its dependence on imported and domestic oil. Because it creates strong disincentives against the use of coal as an energy source, the Montana Coal Severance Tax cuts against an important national goal and should be invalidated under the Supremacy Clause.

CONCLUSION

This case presents timely questions of national importance for determination by this Court. Amici Curiae join the Appellants in urging that the court note probable jurisdiction herein.

Dated: Nov. 14, 1980

Respectfully submitted,

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